they seek to remedy are the purported "shift of the costs of state and local government to other classes of taxpayers" and a "reduction in states' and localities' ability to deliver important public services." *Id.* Respondents' goal is to "free all the states from the necessity of engaging in an escalating competition over incentives that deprives them of needed revenues." *Id.* at 5-6.

Such "injuries" do not confer standing. In order to satisfy the case or controversy requirement under Article III, a plaintiff must demonstrate: (1) that he or she has suffered an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) that the injury likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff must establish that he has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99 (internal quotations omitted). Not any allegation of injury will suffice -- the injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

Respondents' reliance on an alleged "shift" of tax burdens and the purported "reduction in states' and localities' ability to deliver important public services" belies their lack of standing to challenge Ohio's ITC. In truth, they have simply failed to allege a concrete and particularized injury as required by this Court. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. There is, of course, no general "taxpayer standing" that would allow Respondents to pursue this action. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 105-06 (1968) (to have standing, a taxpayer must show that "his tax

money is being extracted and spent in violation of specific constitutional protections" imposed against the power to tax and spend); *Warth*, 422 U.S. at 509 (rejecting asserted taxpayer standing as an "ingenious academic exercise" where the "injury" of increased taxation was indirect and "conjectural").

It is well established that a plaintiff must be able to show that he has sustained or is in immediate danger of sustaining a direct injury, "and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). This Court has repeatedly held that where the asserted harm is a generalized grievance shared by all or a large class of citizens, that harm alone normally does not warrant the exercise of jurisdiction. *Warth*, 422 U.S. at 499; *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) ("standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public"); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) ("it is not sufficient that [the plaintiff] has merely a general interest common to all members of the public").

An alleged injury that is shared in common by members of the public is necessarily abstract and lacks the essential dimension of specificity to the dispute that this Court requires. *See Schlesinger*, 418 U.S. at 220-21. In fact, this Court has unambiguously rejected jurisdiction in such circumstances:

> Only concrete injury presents the factual context within which a court ... is capable of making decisions.... To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role

> of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Id. at 221-22.

Like Respondents' filings in this Court, the underlying complaint alleges abstract and speculative injuries based primarily upon the Respondents' status as citizens and taxpayers. The complaint asserts varying claims brought by three groups of plaintiffs: Ohio citizens/taxpayers, Michigan citizens/taxpayers, and residents of Toledo who allege that they were displaced by the development of DaimlerChrysler's Toledo plant. For reasons set forth below, none of these three groups meet the "irreducible minimum" constitutional requirements of injury in fact, causation, and redressability. *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

According to the complaint, most of the Respondents are residents of the City of Toledo (or corporations doing business in Toledo) who "pay property, sales and/or income taxes to the City of Toledo, Lucas County, and State of Ohio." Compl. ¶¶ 2, 4, 5, *Cuno v. DaimlerChrysler, Inc.*, Court of Common Pleas, Lucas County, Case No. CI0200002084, filed March 28, 2000. These Respondents, referenced in the complaint as the "Ohio Plaintiffs," challenge the ITC on the theory that its operation decreases state revenues and imposes a disproportionate tax burden on them. *See id.* ¶¶ 40, 47. They allege that the application of Ohio's ITC "depletes the funds of the State of Ohio ... thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs." *Id.* ¶ 40.

Both this Court and the Sixth Circuit have made clear that an allegedly increased tax burden does not provide

standing for taxpayers to challenge the application of state tax provisions to third parties.[2] *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (finding that taxpayers do not have a sufficient stake in a controversy to support standing "where their own injury is not distinct from that suffered in general by other taxpayers or citizens"); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999) ("[U]nder settled law, the alleged 'tax burden' injury is not an injury in fact sufficient to confer standing.").

The Ohio Plaintiffs simply have not alleged a direct injury that is distinct from that shared by a large group of Ohio taxpayers. Rather, the purported injury is "merely derivative, and therefore insufficient to establish an injury in fact." *Coyne*, 183 F.3d at 495. Such generalized grievances do not warrant the exercise of federal jurisdiction. *See Warth*, 422 U.S. at 499; *Schlesinger*, 418 U.S. at 220-21; *Ex parte Levitt*, 302 U.S. at 634; *Frothingham*, 262 U.S. at 488;

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[2] It is worth pointing out, moreover, that the Ohio Plaintiffs have also failed to show causation between the tax credit and the alleged harm. Respondents assume that the operation of Ohio's ITC will "deplete[] the funds of the State of Ohio." Compl. ¶ 40. However, as other *amici* have explained, the tax credit can lead to *greater* tax revenues for the State, both (1) from the increased taxes on the new income earned by individuals who are newly-employed because of the new investment, and (2) through increased sales, payroll, property and income taxes on the additional business activities generated through new investment. *See* Br. of *Amici Curiae* Ford Motor Co. & General Motors Corp. in Support of Cert. at 4, Case No. 04-1704; Br. of *Amicus Curiae* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW in Support of Cert. at 5, Case No. 04-1704 ("an incentive package paid to encourage an automaker to invest in a community is quickly recovered through tax revenues generated by jobs created, along with additional indirect or spinoff employment effects") (citation omitted). Respondents' assumptions notwithstanding, the alleged effect of Ohio's ITC on their tax burden is uncertain, "conjectural," and "hypothetical," rather than "concrete" and "actual" as this Court requires. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103.

see also 13 C. Wright, A. Miller, & E. Cooper, Fed. Prac. & Proc. § 3531.10 (2d ed. 1988) ("Any general argument that the plaintiff is injured because his own tax liability is increased by favorable treatment extended to another taxpayer seems doomed to fail.").

Other plaintiffs, who are Michigan taxpayers, allege that but for Ohio's tax credit DaimlerChrysler would have made additional investments in Michigan. *See* Compl. ¶ 42. These individuals, referenced in the complaint as the "Michigan Plaintiffs," do not even come close to meeting the requirements for standing. The Michigan Plaintiffs claim that they are injured by the Ohio tax credit because the credit "induced DaimlerChrysler to continue to operate its plants in Toledo" rather than moving those operations to Michigan.[3] *Id.* They broadly assert that if the plant had been located in Michigan, it would have provided "economic opportunities, in the form of jobs and/or certain tax revenues ... from which the Michigan Plaintiffs would have benefited." *Id.* These allegations fail for several reasons.

First, like the Ohio Plaintiffs, the Michigan Plaintiffs have not alleged a direct injury, but rather generalized grievances (*i.e.*, the lack of new jobs and higher tax revenues) that are shared by Michigan taxpayers and citizens generally. As discussed above, such generalized grievances do not warrant the exercise of federal jurisdiction. *See ASARCO*, 490 U.S. at 613; *Warth*, 422 U.S. at 499; *Schlesinger*, 418 U.S. at 220-21; *Ex parte Levitt*, 302 U.S. at 634; *Frothingham*, 262 U.S. at 488. Nor do their allegations

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[3] Of course, this allegation is directly at odds with Respondents' own argument to this Court that "the actual influence of state and local tax incentives on business location decisions are, at most, marginal" and "there is no evidence that investment tax credits like Ohio's are significant factors in business location decisions." Resp'ts Br. in Resp. to Pet. for Cert. at 7, Case Nos. 04-1704, 04-1724.

suggest an injury that is "concrete and particularized" and "actual or imminent," rather than "conjectural" or "hypothetical." *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. Quite the contrary, the broad suggestion that there may have been additional employment opportunities somewhere in Michigan says *nothing* about these particular plaintiffs. These allegations fall far short of this Court's requirement that a plaintiff "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge*, 454 U.S. at 472.

The Michigan Plaintiffs also fail to meet the requirement of redressability. *See Lujan*, 504 U.S. at 561 (to establish standing, "it must be likely ... that the injury will be redressed by a favorable decision") (internal quotations omitted); *Valley Forge*, 454 U.S. at 472 ("Art. III requires ... that the injury ... is likely to be redressed by a favorable decision.") (internal quotations omitted); *see also Coyne*, 183 F.3d at 495 ("Not only must a plaintiff's injury be direct, a plaintiff must show that a favorable court decision will redress the injury."). Respondents have not even suggested that an injunction entered against the operation of Ohio Rev. Code § 5733.33 would result in relocation of the Jeep plant from Ohio to Michigan. Of course, any such contention would be spurious, as the improvements to the Toledo facility were substantially implemented by the filing date of the complaint. Because the requested relief cannot remedy the asserted injuries to the Michigan Plaintiffs, those plaintiffs have no standing. *See Lujan*, 504 U.S. at 561; *Valley Forge*, 454 U.S. at 472.

The remaining Respondents include Toledo residents and a business that were allegedly displaced from the development area as the result of the use or threatened use of Toledo's eminent domain authority. *See* Compl. ¶¶ 2, 6. This group of plaintiffs also fails the requirement of redressability. The complaint lacks any allegation that the

requested injunction against the operation of the tax credit would undo these plaintiffs' injuries. Indeed, these plaintiffs can make no such claim because each has surrendered his or her property and the area has been substantially developed. They therefore lack standing as well. *See Lujan*, 504 U.S. at 561; *Valley Forge*, 454 U.S. at 472.

Importantly, the only plaintiff that arguably had a claim to standing at any point in this litigation (albeit one that was insufficient), Kim's Auto and Truck Service, Inc., surrendered possession of its property in August 2004 and thus lost whatever claim to standing it may have had.[4] A loss of standing, even during an appeal, undisputedly moots a plaintiff's claims. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (internal quotations omitted); *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (same).

Since Kim's Auto's claim became moot during the appeals process, any judgment that necessarily relied on

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[4] Although Kim's Auto sought an injunction against the operation of the ITC in order to prevent its displacement from the development area, the other Respondents asserting displacement actually surrendered their properties before the filing of this suit. *See* Compl. ¶ 2. *Amicus* does not concede, moreover, that Kim's Auto ever had standing during the course of this litigation. In addition to the redressability problem discussed above, Kim's Auto can show only indirect causation between the tax credit and the asserted injury. The immediate cause of the injury is the government's use of eminent domain. However, Respondents' theory of this case appears to be that Kim's Auto was harmed because the tax credit caused new investment, which led to development, which ultimately necessitated the use of eminent domain, which caused the injury. Although Kim's Auto may have properly challenged the use of eminent domain, any tangible effect of the *tax credit* was, at most, "remote, fluctuating, and uncertain." *Valley Forge*, 454 U.S. at 477 (quoting *Frothingham*, 262 U.S. at 487).

Kim's Auto's standing must be vacated and the case remanded with instructions to dismiss. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see also McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) ("if a case becomes moot during an appeal, the judgment below must be vacated and the case remanded with instructions to dismiss").

II. Ohio's Investment Tax Credit Does Not Violate the Commerce Clause.

Notwithstanding these jurisdictional defects, *if* this Court reaches the merits of Respondents' claims it should reverse the judgment of the circuit court. The challenged tax credit, Ohio Rev. Code § 5733.33, is consistent with the purposes of the Commerce Clause. The ITC encourages economic growth and the free flow of goods among states. It does not discriminate between in-state and out-of-state taxpayers, and it establishes no requirements that disturb the flow of commerce across Ohio's borders.

The Sixth Circuit's holding that such a credit violates the Commerce Clause represents a significant departure from this Court's case law. The Sixth Circuit's decision disregards fundamental principles enunciated by this Court, misapplies relevant precedent, and runs counter to the settled understanding that the Commerce Clause's anti-discrimination principle is intended to invalidate *protectionist* state laws, but not the competitive use of tax policy to encourage intrastate investment.

A. Ohio's Investment Tax Credit Is Consistent With the Principles Enunciated by this Court.

Ohio's ITC provides that a taxpayer may receive a "nonrefundable credit ... against the tax imposed by section 5733.06 of the Revised Code" (Ohio's corporate franchise tax) if the taxpayer "purchases new manufacturing

machinery and equipment" and installs the equipment in Ohio during a qualifying period. Ohio Rev. Code § 5733.33(B)(1). A tax credit is available in an amount equal to 7½ percent of "the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county" over and above the average annual cost of new manufacturing machinery and equipment purchased by the taxpayer for use in that county during three specified prior years. The credit amount increases to 13½ percent if the otherwise qualifying investment is made in an "eligible area" that suffers from specified levels of unemployment or poverty, or has experienced significant closings or downsizing by local employers. *See* Ohio Rev. Code §§ 5733.33(C)(1)-(2), (A)(8)-(16). The ITC therefore serves the dual goals of boosting economic development in Ohio and encouraging job creation in the areas that need it most.

As the panel below recognized, "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743 (6th Cir. 2004). Such incentives fit well within this Court's Commerce Clause jurisprudence. The Commerce Clause empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. The "dormant" or "negative" aspect of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

It is settled that the Commerce Clause prevents states from discriminating against out-of-state or interstate businesses, thus avoiding "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995) (internal quotations omitted). This

does not, of course, mean that states are not free to compete for interstate commerce. Quite the contrary, this Court has emphasized that "competition among the States for a share of interstate commerce is a central element of our free-trade policy." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

This Court has long-recognized that the Dormant Commerce Clause is fundamentally aimed at prohibiting states from engaging in economic protectionism. "This 'negative' aspect of the Commerce Clause prohibits *economic protectionism* -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988) (emphasis added); *see also Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 63 (2005) (noting that the Dormant Commerce Clause "weighs basic principles of federalism against local economic protectionism").[5]

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[5] This Court set out the classic explanation of the Commerce Clause's anti-discrimination principle in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935):

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.... Neither the power to tax nor the police power may be used by the state of destination *with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.* Restrictions so contrived are an unreasonable clog upon the mobility of commerce. *They set up what is equivalent to a rampart of customs duties* designed to neutralize advantages belonging to the place of origin.

Id. at 527 (emphasis added); *see also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-33 (1949).

Consistent with this view, this Court has explained that the "fundamental command of the Clause" is that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The *central rationale* for the rule against discrimination *is to prohibit state or municipal laws whose object is local economic protectionism* ....") (emphasis added). In light of this fundamental command, this Court has noted that the "paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

Nothing in the Commerce Clause prevents states from competing for intrastate investment, so long as they do not do so in a way that imposes a protectionist regime or penalizes those who engage in interstate trade. "The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy*, 486 U.S. at 278 (emphasis added). Hence, even while invalidating protectionist state laws, this Court has emphasized that its decisions do not prevent the states from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). Indeed, the Court has explicitly rejected the notion that states may not compete for interstate commerce, finding that such competition "lies at the heart of a free trade policy," *id.* at 336-37, and that a state may enact laws "that have the purpose and effect of encouraging domestic industry,"

Bacchus Imports, 468 U.S. at 271. *See also Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 385 (1991) ("It is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State.").

Consistent with the framework set out above, it is clear that a state may use low tax rates to attract new investment. *See, e.g., West Lynn Creamery*, 512 U.S. at 199 n.15 (noting that it is "undisputed" that States may attract business through "low taxes"). This Court has even found that direct state subsidies provided to in-state companies impose no burden on interstate commerce, but merely assist local businesses. *See id.*; *New Energy*, 486 U.S. at 278 ("[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition"). Several Justices have noted that tax incentives are equally permissible. *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) ("Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("There seems to be nothing ... that would prevent [a State] from providing subsidies or other tax breaks to domestic industries ....").

Ohio's ITC is designed in precisely the manner contemplated by this Court in *Boston Stock Exchange* and the other cases discussed above. Its purpose is to encourage intrastate investment and promote local economic growth. The ITC is not a protectionist measure. It is equally available to in-state and out-of-state businesses and imposes no "burden" other than the lost opportunity of foregone benefits for those taxpayers who choose to invest elsewhere. The investment tax credit is certainly not akin to a tariff, since it "does not burden in the slightest the transfer of goods

in interstate commerce." *Cuno v. DaimlerChrysler, Inc.*, 154 F.Supp.2d 1196, 1203 (N.D. Ohio 2001). The district court correctly found that the tax credit at issue here does not discriminate against interstate commerce and that to hold otherwise would "violate the clear mandate" of this Court. *See id.*

B. The Sixth Circuit Erred in Finding Ohio's Investment Tax Credit Unconstitutional.

In the decision below, the Sixth Circuit held that Ohio's ITC is unconstitutional because it impermissibly discriminates against interstate commerce. In doing so, the court accepted Respondents' argument that the credit is invalid because its effect "is to encourage further investment in-state at the expense of development in other states" and that this allegedly "hinder[s] free trade among the states." *See* 386 F.3d at 745. In reaching this conclusion, the Sixth Circuit rejected Petitioners' argument that the Dormant Commerce Clause is primarily concerned with preventing economic protectionism. *Id.* Instead, the court suggested that no meaningful distinction exists "between laws that benefit in-state activity and laws that burden out-of-state activity" because, "economically speaking, the effect of a tax benefit or burden is the same." *Id.*

The Sixth Circuit's decision finds no support in any of the cases upon which the court relies. Ohio's ITC does not impose a burden on taxpayers who forego the tax credit and invest elsewhere. A taxpayer, whether in-state or out-of-state, either takes advantage of the ITC or it does not. By contrast, each of the cases relied upon by the Sixth Circuit -- *Boston Stock Exchange, Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) -- involves protectionist measures that imposed direct burdens on taxpayers engaging in out-of-state activity.

Boston Stock Exchange involved a New York statute that imposed a lower transfer tax on securities transactions

completed through New York brokers than on identical transactions using out-of-state brokers. *See* 429 U.S. at 324-25. The higher tax on out-of-state sales constituted a "discriminatory burden on commerce" and was struck down because "no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 331, 337.

Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), this Court struck down a severance tax imposed on natural gas which, through the operation of numerous exemptions and credits offered for local uses, was actually borne only by out-of-state consumers. *See id.* at 756-57 (concluding that the Louisiana tax scheme "unquestionably discriminates against interstate commerce" because "users in other States are burdened with the Tax" while Louisiana consumers are "substantially protected against the impact" of the tax). Likewise, in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), the Court invalidated a tax credit given to corporations based on the portion of their exports shipped from New York. The tax scheme in that case penalized increases in corporations' export activities in other states, and thus imposed an impermissible burden on commerce. *See id.* at 400-01, 406.

In each of these cases, a state's taxing scheme imposed a direct burden on taxpayers who chose to engage in out-of-state activities. The Sixth Circuit recognized the proper legal rule: the Commerce Clause does not "prevent a state from 'compet[ing] with other States for a share of interstate commerce' so long as 'no State [] discriminatorily tax[es] the products manufactured or the business operations performed in any other State.'" *Cuno*, 386 F.3d at 742-43 (quoting *Boston Stock Exch.*, 429 U.S. at 336-37). The court simply failed to correctly apply that rule to the facts of this case.

In contrast to the cases relied upon by the Sixth Circuit, Ohio's ITC does not impose a direct burden on anyone -- it

merely does not provide a benefit to those taxpayers who disregard Ohio's location incentive. It establishes no requirements that disturb the free flow of commerce across Ohio's borders. To the contrary, the ITC actually encourages out-of-state companies to operate across state lines. Unlike the tax credit in *Westinghouse*, which penalized out-of-state activity by decreasing the amount of the credit, Ohio's ITC is available regardless of the extent of the taxpayer's overall presence in the state and the amount is *not* reduced as the taxpayer increases its investment in other states. *Compare Cuno*, 154 F.Supp.2d at 1203, *with Westinghouse Elec. Corp.*, 466 U.S. at 400-01.

The Sixth Circuit sidestepped all of these factors by rejecting the settled view of the Dormant Commerce Clause and denying the legal distinction between permissible efforts to benefit in-state activity and unconstitutional burdens on out-of-state activity:

> The defendants maintain ... that tax incentives, like the Ohio tax credit, are permissible as long as they do not penalize out-of-state economic activity .... In their view, the Commerce Clause is primarily concerned with preventing economic protectionism -- that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce.... [I]t is clear that the [Supreme] Court itself has not adopted this approach in analyzing dormant Commerce Clause cases, undoubtedly because it rests on the distinction between laws that benefit in-state activity and laws that burden out-of-state activity. Such a distinction is tenuous ....

Cuno, 386 F.3d at 745.

The Sixth Circuit's conclusions are erroneous and ignore a wealth of authority issued by this Court. As described in detail above, the "view" that the Commerce Clause is primarily concerned with protectionism is not, as the court postulates, merely Petitioners' "theory." *See id.* This Court has repeatedly explained that the "negative" aspect of the Commerce Clause is aimed at prohibiting protectionism. *See, e.g., Fulton Corp.*, 516 U.S. at 330; *New Energy*, 486 U.S. at 273-74. Indeed, that is the *central rationale* for the anti-discrimination principle and the *fundamental command* of the Commerce Clause. *See C & A Carbone*, 511 U.S. at 390; *Assoc. Indust. of Mo.*, 511 U.S. at 647; *Armco Inc.*, 467 U.S. at 642. The Sixth Circuit's assertion that this Court has not adopted Petitioners' approach is simply incorrect.

The Sixth Circuit's failure to distinguish between laws that benefit in-state activity and laws that burden out-of-state activity is a fatal flaw. This Court has repeatedly drawn precisely that distinction. While the Court has invalidated laws (such as the tax scheme penalizing out-of-state stock sales in *Boston Stock Exchange*) that impose a direct burden on taxpayers, the Court has been careful to remind us that nothing prevents the states from structuring their tax systems to encourage intrastate development. *See, e.g., Boston Stock Exch.*, 429 U.S. at 336. Certainly the Court made this point clear in *New Energy*, where it emphasized that the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only those regulations that burden interstate commerce. *See* 486 U.S. at 278. Simply put, the circuit court erred in failing to distinguish laws that impermissibly burden commerce from those, like Ohio's ITC, that do not.

III. Conclusion.

The importance of this case cannot be overstated. Every state provides tax and other economic incentives as an

inducement to local industrial location and expansion. *See* Timothy Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. Tax'n 359, 359 (2004); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996). The Sixth Circuit's ruling casts hundreds of these programs under a cloud of uncertainty. If that court's erroneous interpretation of the Commerce Clause is allowed to stand, the States will lose one of their key tools for competing in the world market. Indeed, even during the course of this litigation some of Ohio's largest employers have lamented that the Sixth Circuit's holding "seriously impede[s] investment decisions to locate new business operations within the various States" and the result "is unavoidably harmful to the growth and development of our Nation's commerce as a whole." Br. of *Amici Curiae* Ford Motor Co. & General Motors Corp. in Support of Cert. at 13-14, Case No. 04-1704.

The Sixth Circuit's decision results from myriad errors. The court overlooked basic jurisdictional defects and struck down Ohio's investment tax credit even though Respondents lack standing to challenge that provision. In reaching its decision on the merits, the panel rejected this Court's repeated instruction that the Commerce Clause is fundamentally aimed at prohibiting protectionist measures that burden interstate commerce, but *not* any and all attempts to compete with other States for investments. The Sixth Circuit's holding disregards fundamental principles enunciated by this Court and runs counter to the Court's settled understanding and application of the Commerce Clause.

For these reasons, the Ashbrook Center respectfully requests that this Court vacate, or in the alternative reverse, the judgment of the Court of Appeals.

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In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
Petitioners,
v.
CHARLOTTE CUNO, ET AL.,
Respondents.

and

WILLIAM W. WILKINS TAX COMM'R FOR THE STATE OF OHIO, ET AL.,
Petitioners,
v.
CHARLOTTE CUNO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, KENTUCKY CHAMBER OF COMMERCE, MICHIGAN CHAMBER OF COMMERCE, OHIO CHAMBER OF COMMERCE, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, DETROIT REGIONAL CHAMBER OF COMMERCE, AND TOLEDO AREA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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CASES

Associated Industries of Mo. v. Lohman,
511 U.S. 641 (1994) 17

Bacchus Imports, Ltd. v. Director of Taxation,
468 U.S. 263 (1984) 20-21

Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,
486 U.S. 888 (1988) 26

Boston Stock Exchange v. State Tax Comm'n,
429 U.S. 318 (1977) 15, 17

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1996) 15, 28

Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 24

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1992) 29

Cuno, et al. v. Daimler Chrysler, Inc., et al,
386 F.3d 738 (2004) 15, 16, 21, 24, 25

Dean Milk Co. v. Madison,
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Fulton Corp. v. Faulkner,
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Goldberg v. Sweet,
488 U.S. 252 (1998) 25

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976) 15, 25

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 28

Moorman Manufacturing Co. v. Bair,
437 U.S. 267 (1978) 15, 19, 20, 28

New Energy Company of Indiana v. Limbach,
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Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 22

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 4, 26, 27, 28, 29

United States v. Lopez,
514 U.S. 549 (1995) 10

West Lynn Creamery v. Harris,
512 U.S. 186 (1994) 23, 24

Westinghouse Electric Corp. v. Tully,
466 U.S. 388 (1984) 4

OTHER AUTHORITIES

Bureau of Labor Statistics, State Average Annual Wages for 2001-2002 (visited December 1, 2005) <http://www.bls.gov/cew/state2002.txt> 11

Bush Bernard, *Smyrna Nissan plant to add Pathfinder SUV*, THE TENNESSEAN, June 26, 2003, at 1A 12

Bill Carey, *Force of Runyon's personality lured Nissan to Tennessee*, THE TENNESSEAN (Nashville), May 9, 2004 12

Jorge Carrillo, *Transactional Strategies and Regional Development; The Case of GM and Delphi in Mexico*, JOURNAL OF INDUSTRY STUDIES 127 (2004) 9

Economic Development and the Dormant Commerce Clause: The Lessons of Cuno v. DaimlerChrysler and Its Effect on State Taxation Affecting Interstate Commerce, Joint Hearing Before Subcomm. on the Constitution and Subcomm. on Commercial and Administrative Law, 109th Cong., 1st Sess. 27 (2005) . . 7

ECONOMICS AND BUSINESS GROUP CENTER FOR AUTOMOTIVE RESEARCH, THE CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR TO THE U.S. ECONOMY: AN UPDATE (2005) (available at www.cargroup.org/pdfs/AIAMFinal.PDF) 8, 11, 12

Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996) . 6, 13, 17-18

THOMAS FRIEDMAN, THE WORLD IS FLAT; A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (Farrar, Strauss and Giroux 2005) 10

Clayton P. Gillette, *Business Incentives, Interstate Commerce, and the Commerce Clause*, 82 MINN. L. REV. 447 (December 1997) 12-13, 18

GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th Ed. 1991) 22

Danny Hakim, *For a G.M. Family, the American Dream Vanishes*, N.Y. TIMES, November 19, 2005 10

PAUL J. HARTMAN AND CHARLES A. TROST, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2d (2003) 28

Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (May 1996) 24, 25, 27-28

JOHN HUMPHREY AND OLGA MEMODOVIC, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, THE GLOBAL AUTOMOTIVE INDUSTRY VALUE CHAIN: WHAT PROSPECTS FOR UPGRADING BY DEVELOPING COUNTRIES (2003) (available at www.unido.org/file-storage/download/?file-id==11902) 8, 9

Charles E. McClure, Tax competition; is what's good for the private goose also good for the public gander?, 39 NAT'L TAX J. 341 (1986) 18

THE FEDERALIST No. 42 (James Madison) 22-23

Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997) 27

JUAN CARLOS MORENO BRID, MEXICO'S AUTO INDUSTRY AFTER NAFTA; A SUCCESSFUL EXPERIENCE IN RESTRUCTURING?, WORKING PAPER #232 (1996) (available at http://www.nd.edu/~kellogg/WPS/232.pdf) 8

Arundhati Parmar, *GM growth might bring 180 workers*, FORT WAYNE (Indiana) JOURNAL-GAZETTE, November 19, 2005 11

Keith Phillips et al., *Gauging the Impact of the San Antonio Toyota Plant*, VISTA – SOUTH TEXAS ECONOMIC TRENDS AND ISSUES (Federal Reserve Bank of Dallas, San Antonio Branch, San Antonio, TX), Spring 2004 (available at http://dallasfed.org/research/vista/vista0401.pdf) . 8, 9, 13

Keith Russell, *Transfers, local hires to have shot at high-end jobs*, THE TENNESSEAN (Nashville), November 11, 2005 12

Philip Tatarowicz and Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (May 1986) 14-15

THE PADUCAH (Kentucky) SUN, May 20, 2005 12

Ken Thomas, *Auto industry, lawmakers watching S. Ct. on tax incentive case*, ASSOCIATED PRESS, September 28, 2005 11-12

INTEREST OF *AMICI CURIAE*

This *amici curiae* brief in support of the briefs of Petitioners is submitted pursuant to Rule 37 of the Supreme Court Rules.[1] Counsel for Petitioners and Respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The Chamber of Commerce of the United States of America is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and State courts throughout the country on issues of national concern.

The Kentucky Chamber of Commerce is the largest broad-based business association in Kentucky, representing more than 7,000 businesses.

The Michigan Chamber of Commerce is a non-profit membership organization which represents the interests and views of over 6,500 private corporations and businesses engaged in commercial, industrial, agricultural, civic and professional activities in Michigan.

The Ohio Chamber of Commerce, founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part and that no entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

interests of its 4,000 business members while building a more favorable Ohio business climate.

The Tennessee Chamber of Commerce and Industry is the State chamber of commerce and manufacturers' association, representing more than 1,000 members across Tennessee from all facets of business and industry.

The Detroit Regional Chamber of Commerce is a non-profit business advocacy organization, representing more than 21,000 businesses in Southeast Michigan.

The Toledo Area Chamber of Commerce is a broad-based non-profit membership organization in Toledo, Ohio, which represents more than 3,700 businesses.

Each of the above-listed organizations works to enhance the economy and business climate of the State or region it serves. All have a collective interest in this case because the court of appeals' decision has created legal uncertainty which will diminish the value and effectiveness of business tax incentives in Kentucky, Michigan, Ohio, and Tennessee, as well as in States in Circuits other than the Sixth Circuit, and will thereby hinder industrial development in those States.

SUMMARY OF THE ARGUMENT

The Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, Tennessee Chamber of Commerce and Industry, Detroit Regional Chamber of Commerce, and Toledo Area Chamber of Commerce (the "Chambers") submit this brief as *amici curiae* in support of the briefs of Petitioners.

Amici urge this Court to reject Respondents' anti-incentive political agenda, which is based on an ill-informed and outdated understanding of the global economic forces central to business investment decisions in today's economy.

Contrary to Respondents' assertion, this Court cannot free the States from the competition for business investment because that competition is global, not national. Incentives are not part of a zero-sum game pitting States against each other, but a tool used by States to compete effectively with Canada, Mexico and other nations to attract major capital investments which strengthen the United States economy as a whole.

This Court should analyze this case in light of its existing Commerce Clause jurisprudence, which sensibly draws a distinction between unlawful trade barriers and lawful credits, subsidies, and other purely intra-state activities which make an adopting State an attractive place to do business without placing burdens on interstate trade. That distinction is economically meaningful because, while it prevents the creation of trade barriers which impede commerce and impoverish the nation, it allows the creation of incentives, like the tax credits at issue, which have the aggregate effect of lowering costs for intra-state and interstate businesses alike. Grounded in an analysis of economic effects, this Court's existing analytical framework does not require the sort of tortured, formalistic reasoning that the court of appeals necessarily employed in its effort to distinguish Ohio's investment tax credit from run of the mill business subsidies that this Court has long recognized as constitutional. This Court's existing jurisprudence, moreover, carries out the clear intent of the Framers, who created the Commerce Clause to prohibit protectionist tariffs, not to solve what Respondents perceive to be the problem of low aggregate tax rates for businesses. This Court should apply its existing Commerce Clause doctrine to validate the statute at issue, an incentive which lowers the cost of doing business in Ohio without imposing any barrier to goods and services provided in interstate commerce. The Court should reject the Respondents' self-described "novel legal theory" that the

Commerce Clause prohibits laws which affect interstate commerce by making a State attractive to business investment.

To the extent Respondents can assemble empirical support for their view that incentives are bad public policy, they should bring that evidence to the attention of Congress. That body is empowered to create a national policy regarding business incentives that balances the obvious and overwhelming benefits generated by major capital investments like the DaimlerChrysler facility at issue against the perceived, albeit unproven, economic inefficiencies and other costs that Respondents claim such incentives impose on the States. As in *Quill Corp. v. North Dakota*, this Court should reverse the court of appeals' decision, leaving to Congress a clear path for such action as Congress may deem prudent and necessary. 504 U.S. 298 (1992).

ARGUMENT

I. THE COURT OF APPEALS' DECISION ADVANCES A POLICY AGENDA THAT IS NOT MANDATED BY THE COMMERCE CLAUSE AND THAT IS GROUNDED IN A FUNDAMENTAL MISUNDERSTANDING OF THE GLOBAL NATURE OF THE COMPETITION FOR HIGH-WAGE JOBS.

This Court has long recognized that each State has broad authority to craft tax laws to meet the particularized needs of its citizens and, accordingly, that application of the Commerce Clause requires a "delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing power." *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984). The court of appeals' decision upsets this balance, radically expanding the reach of the Commerce Clause anti-discrimination principle to usurp States' authority in the area of business tax incentives. In so